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QUESTIONS PRESENTED AND OTHER MATTERS

Respondent The Detroit News, Inc. refers to, and defers to, the Brief of Respondent the Detroit Free Press, Incorporated for the questions presented and other matters called for by Rule 34 (a), (b), (d), (e) and (f) of the Supreme Court Rules. For its statement required by Rule 28.1, The Detroit News, Inc. refers to the Rule 28.1 Statement included in its brief in opposition to the petition for certiorari.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1640

MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS, *et al.*,
 v. *Petitioners,*

DICK THORNBURGH,
 UNITED STATES ATTORNEY GENERAL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
 for the District of Columbia Circuit

BRIEF FOR RESPONDENT
 THE DETROIT NEWS, INC.

STATEMENT

In this proceeding, the Detroit Free Press (the "Free Press") is fighting for its survival. It has concluded, and the record before the Attorney General demonstrates, that its only chance for survival is implementation of the joint newspaper operating arrangement which the Attorney General approved under the Newspaper Preservation Act ("NPA") in the decision attacked by petitioners in this action.

The Detroit News (the "News"), however, finds itself in what its Chairman has characterized as a "win-win" situation." J.A. 225, 228-29. If the decisions of the Attorney General, the District Court and the Court of Appeals were reversed, and the application under the

Newspaper Preservation Act ultimately denied, the News would find itself as the only metropolitan daily and Sunday newspaper published in the Detroit market. On the other hand, the News is contractually obligated to "support the [JOA] application fully in every reasonable respect and shall cooperate in and coordinate with respect to the taking of all appropriate steps to secure the approval of the application" (JOA agreement ¶ 6-4, NX (Physical) (C))¹ and it has done so. In light of the drastically different consequences to the two newspapers should the Attorney General's decision be vacated, the News has been reluctant to make any statement that might jeopardize the position of the Free Press. For example, the News did not present oral argument in the Court of Appeals and does not intend to do so here. The briefs filed by the News in the Court of Appeals and in this Court have essentially been limited to correcting the factual inaccuracies contained in the filings of *amicus* Little Rock Newspapers, Inc. ("LRNI"), which competes with the News' affiliate newspaper in Little Rock, the Arkansas Gazette.

The News has decided to file this brief in response to petitioners' brief and the brief of *amicus* LRNI for two reasons: (1) as significant members of the newspaper industry, the News and its parent Gannett Co., Inc. are interested in assuring that the Newspaper Preservation Act is correctly interpreted and that this Court has a full understanding of what Congress, in enacting the NPA, referred to as the "unique economic forces" of the newspaper business (116 Cong. Rec. 1786 (1970) (statement of Sen. Bennett)); and (2) petitioners and LRNI mischaracterize the conduct of the News and the Arkan-

¹ The following exhibits referred to in this brief were received into evidence on July 17, 1987: NX Physical (C); NX 1H; NX 2X; NX 613A-B; J.A. 565; J.A. 589-90. The following exhibits were received into evidence on August 17, 1987: JX 1; JX 2; JX 12; JX 16; JX 19. AX 582 was received into evidence on August 18, 1987.

sas Gazette, ignore the economic realities of the newspaper industry, and seek to emasculate the Newspaper Preservation Act.

SUMMARY OF ARGUMENT

Congress recognized that the "economics of the newspaper industry make it more likely for newspapers to fail when faced with competition than other businesses." S. Rep. No. 535, 91st Cong., 1st Sess. 4 (1969). Congress also understood that joint newspaper operating arrangements provided a means to preserve separate editorial voices in metropolitan areas in which those economic forces placed one of the competing newspapers in economic distress. After this Court applied the traditional "failing company" test to a joint operating agreement in Tucson, Arizona, and declared it to be unlawful because the weaker newspaper had not proved that it had "faced the grave probability of a business failure" nor that it grasped at the JOA as the "last straw" (*Citizen Publishing Co. v. United States*, 394 U.S. 131, 137 (1969)), Congress enacted the Newspaper Preservation Act to permit newspapers to enter into JOAs before the "narrow" failing company standard had been met. Congress "declared [it] to be the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement . . . is hereafter effected in accordance with the provisions of this Act." 15 U.S.C. § 1801. Finally, Congress delegated to the Attorney General of the United States the determination of whether a particular newspaper met the Act's new, less stringent, standard of "probable danger of financial failure." 15 U.S.C. § 1802 (5).

It is impossible to read the legislative history of the NPA and conclude, as petitioners would have this Court conclude, that the purpose of the Newspaper Preservation Act was to erect barriers to newspapers entering into

joint operating arrangements. The express purpose of the NPA was to remove the significant barriers to future JOAs created by *Citizen Publishing*.

Newspaper publishers, long before the NPA was enacted in 1970, had recognized that the unique economics of the newspaper industry made it unlikely that smaller newspapers would survive head-to-head competition with a larger newspaper with greater circulation. Those economic realities have long given newspapers a powerful incentive to price their circulation and advertising to ensure that they become the leading, or dominant, newspaper in their market.

To suggest, as do petitioners, that it is the Attorney General's decision in this case that will lead newspaper publishers in the few remaining multiple newspaper cities to compete aggressively for circulation and advertising market shares, is to assume that such publishers are ignorant of the economic realities of their own business. They are not. Newspaper publishers have recognized for decades that being the second newspaper in a two-newspaper city is a condition which is almost always fatal. The series of great newspaper wars, or "price war conditions" (116 Cong. Rec. 1787 (1970)) can be explained by a recognition by newspaper publishers of the same economic forces that led Congress to pass the Newspaper Preservation Act, and by the desire of those newspaper publishers to compete aggressively for circulation and advertising market share to ensure their own "preservation."

ARGUMENT

I. THE SURVIVAL OF COMMERCIAL COMPETITION BETWEEN METROPOLITAN DAILY NEWSPAPERS HAS FOR DECADES BEEN THREATENED BY THE UNIQUE ECONOMICS OF THE NEWSPAPER INDUSTRY, NOT BY THE NEWSPAPER PRESERVATION ACT, THE DECISION OF THE ATTORNEY GENERAL, NOR THE CONDUCT OF THE APPLICANTS.

At various points in their briefs, petitioners and *amicus* LRNI suggest that the Newspaper Preservation Act, the Attorney General's decision in this proceeding, and the conduct of Gannett have imperiled continued commercial competition between metropolitan daily newspapers in the United States. These arguments ignore (1) the history of newspaper competition in the U.S. prior to the enactment of the NPA which saw the number of cities with competing daily newspapers decline from 552 in 1920 to 45 in 1968 (*Newspaper Preservation Act: Hearings on H.R. 279 and Related Bills Before the Subcomm. on Antitrust of the House Comm. on the Judiciary, 91st Cong., 1st Sess. 128 (1969)* [hereinafter "*Hearings on H.R. 279*"] and led Congress to enact the NPA; (2) the economic collapse of the Washington Star, The Philadelphia Bulletin, the Cleveland Press, the Buffalo Courier-Express, the Baltimore News-American and other major metropolitan newspapers after the NPA was passed and before the Attorney General's decision in this proceeding; and (3) the history of newspaper competition in Detroit before Gannett acquired the News in February 1986, and in Little Rock before LRNI's conduct forced the owner of the Gazette to sell it to Gannett in late 1986.

A. The Unique Economics of the Newspaper Industry

When it passed the Newspaper Preservation Act, Congress expressly recognized that "the economics of the newspaper industry make it more likely for newspapers to fail when faced with competition than other busi-

nesses" and that "when a newspaper is failing, it is harder to reverse the process" S. Rep. No. 535, 91st Cong., 1st Sess. 4 (1969). Accordingly, in response to this Court's decision in *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969), applying the traditional "failing company" doctrine to invalidate a newspaper joint operating arrangement, Congress passed the NPA "to establish a less stringent test" for approval of joint operating agreements than that applied in *Citizen Publishing*. S. Rep. No. 535, *supra*, at 4. See also H.R. Rep. No. 1193, 91st Cong., 2d Sess. 10, reprinted in 1970 U.S. Code Cong. & Admin. News 3547, 3555. The unique economics of the newspaper business which led to passage of the NPA were described in the committee reports, the floor debates, the extensive hearings conducted on the Act and predecessor bills, and in the economic literature.

The results of those economic forces were summarized in the statement of the spokesman for the sponsors that was adopted in the House Report:

The history of newspaper economics demonstrates that although the total number of newspapers in operation has not changed radically over the years, nevertheless, economic conditions have created a situation in which a large majority of American communities have already become one owner newspaper communities.

H.R. No. 1193, *supra*, at 3, reprinted in 1970 U.S. Code Cong. & Admin. News at 3548 (quoting statement of Rep. Matsunaga). In 1910, according to the report, almost 60% of U.S. communities with a daily newspaper had two or more. But by 1968, over 95% of the newspaper cities had only one newspaper owner. *Id.* at 3-4, reprinted in 1970 U.S. Code Cong. & Admin. News at 3548. This Court had recognized as early as 1953 that "daily newspaper competition within individual cities has grown nearly extinct." *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 603 (1953).

The reasons for this near extinction of multiple newspaper cities occupied hundreds of pages of hearing testimony during the deliberations on the NPA, but three of the most important are (1) the unique relationship between circulation and advertising—the two different, but interrelated, markets that newspapers serve; (2) important economies of scale which give a large paper with greater circulation an advantage over a smaller competitor; and (3) increased competition from other media, including network, local and cable television, FM radio, direct mail, weekly newspapers, suburban newspapers, shoppers, billboards, local magazines and business journals and special interest publications.

1. *The Interrelationship Between the Markets for Circulation and Advertising*

The mortality rate for second newspapers can, in part, be traced to the fact that newspapers get revenues from two different, but highly interdependent, sources: (1) the sale of the newspapers to readers, and (2) the sale of space to advertisers who wish to have their messages delivered to readers of the newspaper. See *Hearings on H.R. 279*, at 16; *The Failing Newspaper Act: Hearings on S. 1312 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 567-68 (1968) [hereinafter "*Hearings on S. 1312*"]; 116 Cong. Rec. 23,168 (1970) (statement of Rep. Annunzio); J.A. 543; J.A. 510-11; NX 800 Z-21-23 ¶¶ 77-80 (Rosse). An economist testifying at the Senate hearings on the NPA put it this way:

Physically a newspaper consists of newsprint and ink, but from an economic standpoint, it is best described as a combination of services—the furnishing of news and the furnishing of an advertising vehicle. While most of us seek information from a newspaper's advertising columns as well as its news columns, from the newspaper's viewpoint these are two essentially

separate markets. Subscribers will not pay the full cost of gathering the news and printing it, and advertisers pay a good deal more than their share of the total costs—to the point where in recent years 70 to 75 percent of the revenue of the average newspaper derives from advertising. Such a common method of pricing as adding a markup to cost is not, therefore, applicable to the sale of newspaper services. . . . [N]ewspaper pricing has no precise parallel in other industries. . . . [A]nother unique aspect of the newspaper business [is that] success in selling advertising is very largely dependent on success in selling news. In evaluating a newspaper's success in selling news, advertisers are interested not only in how many readers a newspaper has but who its readers are, where they live, and their economic status.

Hearings on S. 1312, at 2588 (statement of Simon N. Whitney, Professor of Economics, New York University).

That advertisers prefer a newspaper that will deliver their messages to the greatest number of potential buyers of the advertisers' goods or services is commonly understood. *Hearings on H.R. 279*, at 10-11; *Hearings on S. 1312*, at 545. The less obvious economic characteristic of the newspaper business is that readers of a newspaper tend to prefer the newspaper that has more, and in some ways better, advertising. J.A. 543; NX 800 Z-22 ¶ 80 (Rosse). See also *Hearings on S. 1312*, at 545; Ferguson, *Daily Newspaper Advertising Rates, Local Media Cross-Ownership, Newspaper Chains, and Media Competition*, 26 J. Law & Econ. 635, 637 (1983). Thus, grocery shoppers generally prefer the paper with the most discount food coupons; home buyers buy the paper with the largest local real estate classified advertising section; and job seekers buy the paper with the largest help wanted sections. J.A. 544.

The effect on circulation of a drop in the amount or quality of advertising is exacerbated when one recognizes that a decrease in advertising revenues correspondingly

diminishes the funds available for gathering and printing the news and other editorial materials. As put by the sponsors of the NPA,

[o]nce a larger newspaper succeeds in attracting advertisers away from its smaller rival (or rivals, if any), the latter is forced to compensate for the loss of revenue by cutting back its news and editorial departments. The consequence is then a further decline in circulation with the almost irreversible downward spiral ending in a business failure.

Hearings on H.R. 279, at 11 (statement of the sponsors of the Newspaper Preservation Act).

The potential for a "downward spiral" caused, in part, by the interrelationship of the circulation and advertising markets was described at the Senate hearings by the publisher of the San Francisco Chronicle:

Circulation, as we know, attracts advertising. By the same token, advertising, directly or indirectly, affects circulation. It attracts circulation directly because the average newspaper reader finds much of interest to him in the advertising which the newspaper contains. It affects circulation indirectly because a sustained drop in advertising lineage generally results in a reduction in editorial lineage. This results, in turn, in a newspaper less attractive to the reader, with consequent further loss in circulation. This spiraling, once commenced, accelerates rapidly and reversal of the trend is always difficult and sometimes impossible. It is almost always a fatal disease.

Hearings on S. 1312, at 545 (statement of Charles Thieriot, President of the Chronicle Publishing Co. and Editor and Publisher of the San Francisco Chronicle). See also 116 Cong. Rec. 1785 (1970) (statement of Sen. Inouye); 116 Cong. Rec. 23,166 (1970) (statement of Rep. Halpern); 116 Cong. Rec. 23,168 (1970) (statement of Rep. Annunzio).

The fatal consequences of this "downward spiral" give newspaper publishers a powerful incentive to price their

advertising and circulation in such a way as to avoid entering the downward spiral. Tr. 2813-14 (Rosse); Tr. 2192, 2245-47 (Morton). See also S. Oppenheim & C. Shields, *Newspapers and the Antitrust Laws* 6 (1981). A newspaper may try to avoid the downward spiral by spending to improve its product and by making pricing decisions designed to make its products attractive to readers and advertisers. These efforts can take the form of heavy promotion expenses and decreased revenues through discounted circulation and advertising prices. Such efforts can be extremely expensive. While such expenditures may have the effect of postponing the downward trends in circulation and advertising for a smaller newspaper, the cost of doing so will almost certainly be operating losses that cannot be expected to be funded indefinitely by the newspaper's owner. "[E]ven a multi-millionaire corporation, whether a chain or an individual, cannot constantly pour money into a failing newspaper in a given city" 116 Cong. Rec. 2006 (1970) (statement of Sen. Hruska).

2. Economies of Scale

Economies of scale also help explain the trend toward single newspaper cities:

Underlying the trend toward fewer commercially competing local dailies is the basic principle of the economy of large-scale enterprise. Once a newspaper is set into type and the plates are put on the press, the cost of production per copy goes down as circulation goes up.

Hearings on H.R. 279, at 121 (statement of Raymond B. Nixon, Professor of Journalism, University of Minnesota). See also *Hearings on S. 1312*, at 2589.

The costs of producing the first copy of a newspaper include gathering the news and paying for reporters, correspondents or wire services; editing the news; preparing or purchasing other editorial features such as

columns and comics; composing or setting up the newspaper; preparing the plates, and purchasing the printing press and other production equipment. NX 800 L ¶ 15 (Rosse). These "first copy" costs are incurred whether the newspaper prints 10,000 copies or 1,000,000. *Id.* Accordingly, the cost per copy is lower for the newspaper with higher circulation. *Hearings on S. 1312*, at 2589; *Hearings on H.R. 279*, at 121. By the same token, since the costs of delivering the newspaper are essentially the same whether the newspaper is ten pages long or one hundred, the distribution cost per page or per inch of advertising is significantly lower for a larger paper. NX 800 L ¶ 16 (Rosse). Accordingly, when two newspapers compete in the same market, the paper that is larger and has greater circulation enjoys an important competitive advantage through the operation of economies of scale. *Hearings on S. 1312*, at 2589; NX 800 O ¶ 20 (Rosse); AX 582.

A related phenomenon has to do with the advertising advantage enjoyed by a newspaper with greater circulation. As explained by Senator Hayden,

[a]dvertising rates are based on circulation. The paper with the greatest circulation has an advantage that builds on itself. The paper's marginal ad revenues exceed marginal circulation costs, and it can thus offer a lower milline rate (cost per line adjusted to circulation) and still earn more than its competitor.

Hearings on S. 1312, at 454 (Senate Bill 1312—"Failing Newspaper Act of 1967": An interview with Senator Carl Hayden of Arizona, Author of S. 1312). Thus, if two newspapers, one with 1,000 subscribers and the other with 2,000 subscribers, are competing for the same advertisers and they each charge \$1.00 per line for advertising—the cost for the advertiser to reach 1,000 subscribers with a line of advertising is \$1.00 in the smaller paper, but only 50 cents in the paper with larger circulation. That gives the paper with the larger relevant

circulation a substantial advantage in attracting advertisers. *Hearings on H.R. 279*, at 10-11; *Hearings on S. 1312*, at 454; 116 Cong. Rec. 1785 (1970) (statement of Sen. Inouye); J.A. 545-46.

3. Increased Competition with Other Media

While the unique relationship between circulation and advertising and the principles of economies of scale explain why Congress concluded that the economics of the newspaper industry make it more likely for newspapers to fail than other businesses when faced with competition, two newspapers in the same city do not compete in a vacuum. The witnesses at the congressional hearings explained that over the years competing newspapers began to face dramatically increased competition from other media for the attention of readers and, particularly, for the most important source of revenues—advertising. As explained by a principal sponsor of the NPA,

[n]ewspapers receive a considerable portion of their revenues from subscribing readers, but their primary source of income is from advertising. It is in the area of advertising that newspapers have encountered real problems. Competition from other advertising media, such as television, news magazines and suburban news publications, has taken its toll. Consequently, these newspapers have also suffered a steady decline in their share of the local and national advertising dollar.

Newspaper Preservation Act: Hearings on H.R. 19123 and Related Bills Before the Subcomm. on Antitrust of the House Comm. on the Judiciary, 90th Cong., 2d Sess. 38 (1968) [hereinafter "Hearings on H.R. 19123"] (statement of Rep. Matsunaga). Another sponsor testified that "newspapers have faced increasing competition for advertising revenue. First radio, then television, plus magazines, billboards, and 'throw away' papers have diverted revenues which formerly went to newspapers." *Hearings on H.R. 279*, at 41 (statement of Rep. Bel-

cher). See also *Hearings on S. 1312*, at 454; 116 Cong. Rec. 23,168 (1970) (statement of Rep. Annunzio); J.A. 550, 552; NX 800 I ¶ 10 (Rosse). As a result of this competition from other media, newspapers' share of total advertising expenditures in the United States declined from 36 percent in 1950 to 26.4 percent in 1987. J.A. 551.

B. The Consequences of the Unique Economics of the Newspaper Business to Newspapers Facing Direct Competition

The consequences of the fundamental economic forces at play in the newspaper business were well known to both newspaper publishers and economists even before Congress enacted the Newspaper Preservation Act. Newspaper publishers had watched the number of cities with more than one commercially competitive newspaper dwindle from 552 in 1920 to 45 in 1968. *Hearings on H.R. 279*, at 128. The process by which the leading or dominant newspaper² in the competitive market uses the economic advantages given by its greater circulation to increase its lead over the junior paper was perhaps most succinctly stated by one newspaper publisher:

The strong grow stronger. The weak grow weaker. *Hearings on S. 1312*, at 568 (statement of Charles L. Gould, Publisher of the San Francisco Examiner).

The impact of the unique economics of the newspaper business upon competing newspapers was known long before the NPA. As early as 1952 an economic commentator pointed out that:

² It is important to note that the word "dominant" is used in the newspaper business, not in the antitrust sense, but as a term of art meaning the newspaper that leads in daily and Sunday circulation and in advertising share of the field. See, e.g., Tr. 1247 (Hall). A "second" or "junior" newspaper in a two-newspaper market is a newspaper that does not have those leads.

- Daily newspapers must seek economic success in two separate yet interdependent markets: reader circulation and advertising space sales. (959)
- The cost structure of daily press operations favors the daily with greater circulation. . . . [A]verage unit labor costs diminish directly with greater circulation. (974-75)
- Where two or more dailies serve a single community, the paper offering lower milline rates generally secures greater retail display linage. (982)
- [W]here local dailies compete in the community, publishers' low retail rates and special discounts to large retail buyers may be accentuated. (993)
- Where more than one paper serves a single community, the prevailing pattern of ad marketing probably curbs the success of the smaller-circulation daily. (998)
- [In] full-scale price competition with more efficient rivals, the smaller daily's cost handicap may lessen its chances for economic survival. (999)
- Typically, . . . the structure and organization of the circulation and advertising markets exert pressure on small competing papers to suspend publication, or to combine and achieve more efficient operations. (1001)
- Since newspaper size *is* efficiency, the smaller competing daily which could supply diversity of opinion and news presentation is consistently handicapped in its struggle for independent survival. (1007)

Note, *Local Monopoly in the Daily Newspaper Industry*, 61 Yale L.J. 948 (1952).

The practical business consequences to a newspaper publisher facing competition from another metropolitan daily newspaper in the same city were also obvious. To permit a newspaper's daily or Sunday circulation to fall

significantly behind that of the competitor was almost always fatal. *Hearings on H.R. 279*, at 11; *Hearings on S. 1312*, at 446, 545; 116 Cong. Rec. 23,168 (1970) (statement of Rep. Annunzio); J.A. 555-56; NX 700 Z-37 ¶¶ 103-05 (Morton); Tr. 1927 (Chapman). Accordingly, the task of a competing newspaper that trailed its competitors was clear. The second newspaper had to do everything possible to increase circulation so that it could increase advertising. J.A. 555-56. The appropriate course for the dominant newspaper was equally clear. It could take no action which would jeopardize its leads in circulation and advertising. Those conflicting objectives produced, in city after city, "great newspaper wars."

While the need to win the great newspaper war was felt in all decisions made at a competing newspaper, in no area was the economic necessity greater than in the area of pricing. In order to build circulation and attract advertising, newspapers have traditionally set the price of the newspaper to readers and subscribers at a level which often did not cover the costs of distributing the newspaper, much less the costs of creating the editorial product, buying the newsprint and ink, or producing the newspaper. *Hearings on S. 1312*, at 1771, 2588; J.A. 510-11; Tr. 972 (Hall).

The incentive for the newspaper to keep circulation prices low, even in cities with only one metropolitan newspaper, has been well documented. See Note, *Application of the Antitrust Laws to Newspaper Distribution Systems: The Sherman Act Turned on its Head*, 38 U. Fla. L. Rev. 479, 481, 484, 486 (1986); 134 Cong. Rec. S8777 (daily ed. June 29, 1988) (statement of Sen. Leahy); Tr. 1724-25 (Neuharth); Tr. 2288 (Morton); J.A. 307-09. The issue reached this Court in *Albrecht v. The Herald Co.*, 390 U.S. 145 (1968), a case involving a newspaper's imposition of a maximum resale price on its distributors. As Justice Stewart noted in dissent,

[b]ecause the major portion of the respondent's income derives from advertising rather than from sales to distributors, the respondent's self interest is in keeping the retail price of the paper low in order to increase circulation and thereby increase advertising revenues.

Id. at 169 n.2.

The Court's decision in *Albrecht*, that maximum resale price agreements were *per se* unlawful, has spawned a substantial amount of litigation against newspapers. In much of that litigation, courts have articulated the newspaper publisher's need to keep circulation prices low, and the beneficial effect that need has on consumers. See *Northwest Publications, Inc. v. Crumb*, 752 F.2d 473 (9th Cir. 1985); *Auburn News Co. v. Providence Journal Co.*, 659 F.2d 273 (1st Cir. 1981), *cert. denied*, 455 U.S. 921 (1982). By contrast, an independent distributor whose only interest is in the selling price of the newspaper and who does not share in the advertising revenues does not share the publisher's interest in low circulation prices. The individual distributor can increase profits by selling fewer papers at higher profits. The economic need for newspapers to keep circulation prices low has been noted by several economic commentators who have suggested that *Albrecht* should be overruled. See Blair & Kaserman, *The Albrecht Rule and Consumer Welfare: An Economic Analysis*, 33 U. Fla. L. Rev. 461 (1981); Blair & Schafer, *Evolutionary Models of Legal Change and the Albrecht Rule*, 32 Antitrust Bull. 989, 990 (1987); Hovenkamp, *Vertical Integration by the Newspaper Monopolist*, 69 Iowa L. Rev. 451 (1984); Note, *Application of the Antitrust Laws to Newspaper Distribution Systems: The Sherman Act Turned on its Head*, 38 U. Fla. L. Rev. 479 (1986).

The pricing behavior of other media with which newspapers compete underscores the need to keep newspaper prices low. Many of the other media "distribute" their

products free. For example, television, radio, shoppers, direct mail, billboards, and yellow pages do not charge their viewers or readers. By providing a product at the lowest possible price—i.e., free—these competing media are able to attract a large audience, thereby attracting large numbers of advertisers. Because newspapers derive the bulk of their revenue from advertising, it follows that they have the same need as the other media to keep prices as low as possible.

Since advertising revenues account for between 70% and 75% of a typical newspaper's revenues (*Hearings on S. 1312*, at 2588), and because the amount and quality of advertising help attract readers to a newspaper, advertising market share is necessarily a key battleground in the head-to-head competition between metropolitan daily newspapers. It has long been recognized that newspapers heavily discount advertising rates to large volume retail advertisers. *In the Matter of Times Mirror Co.*, 100 FTC 252, 256 (1982); Note, *Local Monopoly in the Daily Newspaper Industry*, 61 Yale L.J. 948, 980-81 (1952). One of the reasons for discounts to such retail advertisers is that their advertisements about sales, coupons and other information are valuable in attracting readers. Another, perhaps more subtle, reason for the emphasis on retail and classified market share is that success builds success. Because, for example, a person seeking to buy a home will purchase a newspaper with the most local real estate classified advertisements, an advertiser wishing to sell a home will seek to place the advertisement in the newspaper that will attract the most potential buyers. That dynamic has led at least one newspaper to offer free personal classified advertising. Opposition of The Detroit News, Inc. to the Motion of Little Rock Newspapers, Inc. for Leave to Appear as Amicus Curiae in the District Court, at 4.³ That same

³ That opposition has been filed with this Court as Exhibit F to Opposition of Respondent the Detroit Free Press, Incorporated to Petitioners' Motion for a Stay.

dynamic leads all newspapers in competitive markets to price their advertising to build market share as part of their efforts to ensure that they will win the competitive battle, and by so doing, survive.

C. Congressional Reaction—Passage of the NPA

Congress recognized that the fundamental economics of the newspaper business made the survival of competing metropolitan daily newspapers increasingly unlikely. S. Rep. No. 535, 91st Cong., 1st Sess. 4 (1969); H.R. Rep. No. 1193, 91st Cong., 2d Sess. 3-4, *reprinted in* U.S. Code Cong. & Admin. News at 3548. Congress also recognized that joint operating agreements provided a method of preserving editorial competition in the remaining cities with more than one newspaper. S. Rep. No. 535, *supra*, at 2-3; H.R. Rep. No. 1193, *supra*, at 3, *reprinted in* 1970 U.S. Code Cong. & Admin. News at 3547. *See also* 116 Cong. Rec. 23,156 (1970) (statement of Rep. Buchanan). Finally, Congress recognized that application of the judicially created “failing company” doctrine to test the legality of newspaper joint operating arrangements simply would not work. S. Rep. No. 535, *supra*, at 4; H.R. Rep. No. 1193, *supra*, at 10, *reprinted in* 1970 U.S. Code Cong. & Admin. News at 3555; 116 Cong. Rec. 1786 (1970) (statement of Sen. Bennett). Under the “narrow scope” of the failing company doctrine as set forth in *Citizen Publishing Co. v. United States*, 394 U.S. 131, 139 (1969), the parties needed to show

that the resources of one company were so depleted and the prospect of rehabilitation so remote that “it faced the grave probability of a business failure.”

Id. at 137 (citations omitted). In addition, the parties were required to show that there was no other prospective purchaser. *Id.* at 138.

Congress concluded, however, that because of the economics of the newspaper business, by the time a newspaper could meet the standard of the failing company test, it

would be too late to save an editorial voice through a JOA. *See* S. Rep. No. 535, *supra*, at 6. By the time it became clear that a JOA was the “last straw” to save a failing newspaper, the dominant paper would have no incentive to enter into a JOA. *Hearings on H.R. 279*, at 12. Instead, it could either wait until the weaker newspaper shut down or, if the requirements of the failing company doctrine were met, it could buy the assets of the competing newspaper outright. As a sponsor of the NPA stated, “the court should be able to recognize the trend toward failure and not be required to wait until it is irreversible.” 116 Cong. Rec. 1787 (1970) (statement of Sen. Bennett).⁴ *See also Hearings on H.R. 279*, at 12; *Hearings on H.R. 19123*, at 40-41.

Accordingly, Congress passed the Newspaper Preservation Act and authorized the Attorney General to permit newspapers to enter into a JOA at a time *before* the “grave probability of a business failure” standard of *Citizen Publishing* had been met. *Committee for an Independent P-I v. Hearst Corp.*, 704 F.2d 467, 474 (9th Cir.), *cert. denied*, 464 U.S. 892 (1983). *See also Hearings on H.R. 19123*, at 40-41.

D. Events Since the Passage of the NPA in 1970

Since the passage of the NPA in 1970, the economics of the newspaper industry have not changed. They have worked themselves out in ever larger and larger metropolitan areas. While the failing newspapers in Cincinnati, Seattle, Anchorage, and Chattanooga were able to convince

⁴ Justice Douglas seemed to recognize this in *Citizen Publishing* when he said that “there is no evidence that the joint operating agreement was the last straw at which the Citizen grasped. Indeed the Citizen continued to be a significant threat to the Star. How otherwise is one to explain the Star’s willingness to enter into an agreement to share its profits with the Citizen.” 394 U.S. at 138. By implication, if the Citizen had waited until the “failing company” test had been met, the Star would have had no need to share profits with the Citizen.

their dominant competitors to enter into JOAs, the Washington Star, The Philadelphia Bulletin, the Cleveland Press, the Buffalo Courier-Express, and the Baltimore News-American were not so lucky. They shut down and ceased publication, in some cases after efforts to negotiate a JOA were rejected. Tr. 2365 (Morton). The reasons for the inability of those papers to enter into a JOA are varied. In some cases, the failing paper's doom was so clear that the dominant paper had no incentive to enter into the JOA. At least in one case the time and expense associated with a JOA application were cited as a reason. *Buffalo Courier-Express faces Sept. 19 closing*, Editor & Publisher, Sept. 11, 1982, at 13.

Consequently, by 1987, the number of cities with more than one competitive daily newspaper had dropped to 26. NX 800 H ¶ 9 (Rosse); J.A. 589-90. Even in the 30 largest newspaper markets, the number of cities with more than one competitive newspaper had dropped from 25 in 1950 to 9 in 1986. J.A. 565; J.A. 537-38; J.A. 539-40. In addition, at the time of the hearing in Detroit, of the 30 largest newspaper markets, there were only 4 where the second or smaller newspaper was even marginally profitable and none where the second newspaper was earning more than a marginal profit. J.A. 565; J.A. 537-38; J.A. 539-40. Given these economic realities, the incentive for a competing newspaper to become or remain the dominant, or leading, daily newspaper in its market is obvious. That lesson was apparent to newspaper publishers, and to Congress, well before the Attorney General's decision in the Detroit case and well before Congress enacted the Newspaper Preservation Act in 1970.

II. NEWSPAPER COMPETITION IN DETROIT

A. The News and Free Press Fight for Survival

The Attorney General found that competition in Detroit was waged "energetically, but both responsibly and properly." J.A. 151. The record before the Attorney General

established that in the late 1970s or early 1980s management at both the Free Press and the News concluded that there was no safe place for a second-place newspaper in Detroit. J.A. 143-44. That judgment was based, in part, on an awareness of the fate of second-place newspapers in Washington, Philadelphia, Cleveland, Buffalo, and dozens of other major cities in which the competitive battle had resulted in the death of the second-place newspaper, and, in part, upon the economic realities of the newspaper business discussed above. J.A. 504-09; J.A. 208, 212-13; J.A. 404-05; J.A. 443-44; J.A. 325-26. Both the Free Press and the News concluded that victory in the great Detroit newspaper war was necessary, not to feed their pride, but to ensure survival. J.A. 405; J.A. 510; J.A. 208, 212-16.

Because of that fundamental conclusion, both newspapers adopted strategies to gain or maintain leadership, or dominance, particularly in daily and Sunday circulation in their primary circulation marketing area and in the crucial areas of retail and classified advertising lineage and revenues. Both newspapers saw leadership in these competitive categories as the only path to long-term profitability and survival, and both papers fought aggressively to win those competitive battles. The ALJ found that the

Free Press and Knight-Ridder as well as News and ENA management believed that the goals of dominance and future profitability at the cost of near-term earnings were rational policies given the past history of many junior newspapers which had not been able to survive as the second paper in metropolitan area competition.

Pet. App. 19a.

The principal difference between the strategies of the two newspapers was that the News was fighting to maintain its leads in all important areas of competition while the Free Press had to struggle to overtake the News' existing competitive advantages. In pursuit of its

goal, the Free Press brought to Detroit the executives who had won a "great newspaper war" in Philadelphia, built a state-of-the-art printing plant, engaged in heavy circulation promotion and discounting, and competed aggressively for advertising by offering discounts. Pet. App. 17a-18a.

The pressures on the Free Press were especially acute because it was attempting to stave off the effects of the downward spiral by "buying [its] way out of it." Tr. 2240-41 (Morton). Like other papers before it (*i.e.*, The Philadelphia Bulletin and the Washington Star, both of which eventually closed), the Free Press, although feeling the effects of the downward spiral, directed its efforts towards masking it through huge expenditures. See NX 800 Z-30-33 ¶¶ 96-100 (Rosse). As John Morton testified, the downward spiral was

something that the Free Press has been spending mightily to avoid getting into for the last several years. It's my belief that should they stop their investment and capital projects, promotion, product improvements, they would very quickly slip into it.

Tr. 2240 (Morton).

During this competitive battle, the Free Press was owned by Knight-Ridder, the second largest newspaper group in the country. The News was owned by the smaller Evening News Association ("ENA"). Despite the fact that it was competing with a paper whose parent had much greater resources, the News under ENA determined to take whatever action was necessary to preserve its lead in the Detroit market. Peter Clark, President of ENA, testified at the hearing that

because a newspaper gets the vast majority of its total revenues from advertising, it is essential to insure that the advertising revenue continues to come in. To do so, a competitive metropolitan daily newspaper must have a higher circulation than its com-

petitor, and the location of that circulation must be attractive to advertisers.

J.A. 511.

Accordingly, when the Free Press used its position as the only morning newspaper in the State of Michigan to narrow the News' overall circulation lead, the News responded by introducing its own morning edition. The News built a new suburban plant to better serve suburban and out-state subscribers with more timely news. In addition, the News, as well as the Free Press, engaged in heavy circulation discounting to promote sales of the newspapers. J.A. 518; Tr. 1382-84, 1395-96 (Clark); J.A. 584-85; Tr. 1065-66 (Hall); Tr. 2884 (Lawrence).

When the Free Press raised its daily single copy price in 1979 to 20¢ from 15¢, the News refused to follow—its price remains 15¢ today.⁵ J.A. 512; J.A. 518; J.A. 214-16; Tr. 1511 (Clark); J.A. 340-42. Robert Nelson, Publisher of the News under the ENA, testified that "advertising share of field is predicated to a great extent on circulation." J.A. 335A. Accordingly, his position was "that The Detroit News was not going to increase its price." J.A. 337-41. That policy was adopted because of a concern that to increase the price would result in a loss of circulation. "We've had a history of what's happened when we've increased the price and we've had a loss." J.A. 341-42, 348 (Nelson). "I was going to be able to increase my lead over the Free Press on the daily paper and the Sunday paper, and I wasn't going to do a single thing that wasn't going to allow me to do that." J.A. 341 (Nelson).

Peter Clark, then President of ENA, explained in his testimony:

⁵ The News' philosophy on circulation goes back to its founding in 1873. The News was founded as a two-cent paper in a city where the other papers sold for five cents. Tr. 1499-1500 (Clark).

Q. Now, as I understand your direct testimony, the ENA strategy grew out of a belief that you and other members of the ENA board held in the early 1980s that in the long term Detroit could not support two metropolitan daily newspapers. Is that a fair summary of your direct testimony?

A. Well, in 1982 or so I concluded that it was no longer possible for this marketplace to sustain two major daily newspapers in competition. The rest of the board, I think at least most of them, came to agree with that over a period of months or years.

Q. And as a corollary to that belief, you also felt that there was no safe niche for a second newspaper in this city, correct?

A. That's correct.

Q. And indeed, you felt that if the News became the No. 2 newspaper in this town, it wouldn't survive?

A. I felt that—that's correct. I thought we might have four to five years of survival if we became No. 2 but would inevitably die.

J.A. 208.

* * *

Q. Did you draw any other conclusions from your observations of what was happening in other cities to second newspapers in those markets?

A. Well, I concluded somewhere in the 1980s that in the big-city metropolitan newspaper competitive situations a second paper could not survive. I suppose I reached that conclusion at the same time I reached it about the Detroit situation, in the early or mid-1980s. A second paper I thought could not make it any more. That's not New York City, but that is the others that we have touched on.

Q. What effect on your resolve to keep The Detroit News No. 1 did that conclusion have?

A. Well, if anything it made us fight more fiercely. I think the record shows we fought like hell to save The Detroit News.

J.A. 213.

When asked about the reasons ENA did not raise the single copy price to 20¢ when the Free Press did in 1979, Mr. Clark explained:

A. The decision not to move the price, the cover price and home delivery total price of The Detroit News in 1979 was based on the basic necessity to keep the paper in the No. 1 position in aggregate total circulation and also in circulation in the PMA in order to survive. J.A. 214-15.

* * *

A. The desire to be No. 1 was a commercial motive because, No. 1, being No. 1 was the basis for the share of advertising market that we then enjoyed and wanted to continue to enjoy, and the advertising that that share produced is what is the lifeblood of our company. It's what kept us going, especially retail and classified revenues. Without the circulation share we would not have had the advertising share. Without the advertising share we wouldn't have had the revenues and we would have been gone. J.A. 215.

In 1985, when ENA was experiencing substantial shareholder unrest, the News decided to follow a Free Press increase in the circulation price of the Sunday paper. The News did so in part because it had a very substantial lead on Sunday and in part because of the shareholder unrest.⁶ Nevertheless, ENA officials concluded that follow-

⁶ ENA's shareholder unrest in 1985 ultimately led to a tender offer being made for ENA's stock by a non-newspaper company. In response, ENA solicited the interest of certain companies, including Gannett. In August 1985, Gannett made an offer to purchase ENA which was consummated in February 1986.

ing the Free Press circulation price increase on Sundays was a mistake not to be repeated. J.A. 518; Tr. 3401-04 (Nelson); Pet. App. 90a.

Despite the intensive efforts of the Free Press to overcome the News' leads and despite Knight-Ridder's deeper pockets, in 1985, the last year under ENA (rather than Gannett) ownership:

- The News' market share lead in total daily circulation was slightly greater than it had been in 1976, the year that the News started a morning edition. JX 1; Pet. App. 40a.
- Although the Free Press had made slight gains in market share on Sunday, it still trailed the News by over 81,000 papers. NX 1H. See JX 2. Sunday is the most important edition because it has the largest circulation and is the most attractive to advertisers. J.A. 378-79, 380; J.A. 482; Pet. App. 43a-44a.
- In the three-county primary market area which is most important to advertisers (Pet. App. 44a) the News' circulation lead was still over 242,000 papers on Sunday and 105,000 papers daily. NX 1H.
- The Free Press share of advertising revenues, which account for 72% of its total revenues (Pet. App. 58a) had declined since 1982 and its advertising revenues were more than \$60 million lower than those of the News. JX 12; NX 613A-B.
- The Free Press share of combined daily and Sunday full run advertising lineage was at a ten-year low and it trailed the News 56,476,636 lines to 35,140,749 lines for the Free Press. JX 19; NX 2X; Pet. App. 59a-65a.
- The News led in classified advertising by 23,857,297 lines to 11,050,828 lines, a nearly 70% market share. Pet. App. 67a-69a. Classified advertising is especially important because it serves as a stimulus to circulation. J.A. 481; J.A. 373-74; Pet. App. 66a-67a.

- Total retail advertising for both Detroit newspapers had declined from 54,719,098 lines in 1978 to 38,808,914 in 1985 and the Free Press share of this diminishing total had declined to 42.6%, a ten-year low. JX 16; Pet. App. 67a. Retail advertising is the most important source of newspaper revenues (J.A. 542-43), accounting for 81% of News and 72% of Free Press total revenues, respectively. Pet. App. 58a.

Despite all of its competitive efforts to take the circulation and advertising leads, the Free Press found itself in 1985, after spending well over \$150,000,000 in losses and cash investments since 1980, reduced to hoping that the much smaller ENA, which was experiencing shareholder unrest, would lose its resolve. J.A. 406.

B. "Win-Win"

When the ENA shareholders unrest ultimately led to the sale of ENA, and with it the News, to the nation's largest newspaper group, the Free Press may have hoped that the new owners would abandon the aggressive competition which had stymied the Free Press. They were, however, disappointed. Tr. 1030-31 (Hall); Tr. 3009 (Lawrence); Pet. App. 91a. Mr. Neuharth, Chairman of Gannett, testified that he adopted a "win-win" strategy for the News. J.A. 225, 228-29. See also J.A. 480-81. The News would continue to strive to enhance its competitive position until it was a clear winner in all important areas of competition. Gannett took steps to increase the News' circulation lead through improved editorial content, increased promotion, and decreased single copy prices in the out-state area, which had been the Free Press' strongest circulation area. J.A. 484-85. Mr. Neuharth testified that:

When Gannett acquired the News in February 1986, we were fully aware of an economic fact of life in the newspaper business:

- the dominant newspaper ultimately thrives;
- the weaker paper ultimately dies.

One need look only at the major newspaper deaths in just the last five years in Philadelphia, Cleveland, Buffalo, Washington, St. Louis, and most recently Baltimore, to become painfully aware of this fundamental principle for major newspaper markets.

With this truism in mind, my instruction to the new management team in Detroit was simple: the News was to be the *clear winner* in every important category of competition in its circulation and advertising markets.

J.A. 480-81. See also J.A. 220. The policies adopted by the News were designed to assure that whether or not a JOA was approved, the News would be the surviving newspaper in Detroit. That was the "win-win" strategy. Pet. App. 83a.

On cross examination by the Antitrust Division, Mr. Neuharth elaborated:

So the facts, very simply, are that in most, nearly all, of those situations, the economic facts of life in the newspaper business have been for the past 40 years the dominant newspaper, if it maintains its dominance long enough or enhances it, it ultimately thrives; the weaker newspaper ultimately dies. Sad but true.

Q. Why does the weaker paper stay in the market?

A. For a variety of reasons. Sometimes the weaker paper is owned by an individual or family that has other means of financial support and sometimes can afford to maintain a long family tradition irrespective of the bleeding from a losing operation. Sometimes—less so in the 1980s but more true in the '40s and '50s—there have been political reasons by the owners of a newspaper that was weaker or non-profitable sustained it with a life support system.

Sometimes an owner, parent company, has bet on the long term and taken a risk that circum-

stances would change and therefore has kept it alive.

So there are a variety of reasons. But in every instance—every instance—the weaker newspaper has either died or been saved by a JOA or is presently in danger of dying. There are no exceptions in this country.

Q. But those that are presently in danger of dying, might there not be some whose publishers hope to reverse the trends and become the dominant paper?

A. Oh, absolutely and the publishers of those who did die also hoped to do that.

But I'm not talking about hope. I'm talking about reality, not hopes or fiction or speculation—reality—and the facts are that those are the realities in the newspaper business.

J.A. 220-21.

While under Gannett ownership the News has increased its circulation lead, the real significance of the News' policies under Gannett is that the Free Press' hope that ENA management would make a mistake and lose its competitive resolve had been dashed. Gannett's operations of the News by April 1986 made clear that it would not abandon the policies which had, under ENA management, given the News its position of leadership in the important areas of competition. J.A. 222-24.

Petitioners suggest that Gannett's willingness to enter into a JOA somehow indicates that the Free Press was not a failing newspaper within the meaning of the Newspaper Preservation Act. This argument is, of course, circular and, if accepted, would be sufficient to defeat any joint operating arrangement.

A similarly flawed argument is petitioners' suggestion that because Gannett agreed to a joint operating arrange-

ment which, after five years, gave the Free Press 50% of the joint operating profits, the Free Press must not have been a failing newspaper.⁷ While Congress had directed that the Attorney General make the determination of whether a newspaper is in probable danger of financial failure "regardless of its ownership or affiliations," the ownership of the Free Press was not a fact that Gannett could ignore in considering whether to enter into a joint operating arrangement in Detroit. Although Mr. Neu-harth, then Chairman of Gannett, believed that the Free Press was a financial failure, he could not know how long Knight-Ridder, with its considerable resources, would continue to pour money into the Free Press. It was that uncertainty, coupled with the smaller but nonetheless substantial losses at the News, that gave the Free Press whatever bargaining power it had. To suggest, as do the petitioners, that it is premature to enter into a joint operating agreement before the failing newspaper and its parent have lost all bargaining power flies directly in the face of Congress' intent in enacting the Newspaper Preservation Act.

The record establishes that implementation of the JOA is the only way to return the Free Press to profitability and prevent it from following the Washington Star, The Philadelphia Bulletin, the Cleveland Press, the Buffalo Courier-Express and the Baltimore News-American to the newspaper graveyard. The ALJ rejected several possible alternatives such as cost-cutting by the Free Press (Pet. App. 100a-102a), further geographic segmentation by the Free Press (Pet. App. 102a-103a), emulation of The New York Times demographic segmentation approach (*id.*), or unilateral circulation or advertising price increases by the Free Press (Pet. App. 93a). Even the Antitrust Division's economic expert

⁷ The 50/50 profit split in the Detroit agreement is not unique or unusual. Eleven of the original twenty-two joint operating agencies began with 50/50 profit splits. Tr. 2362-63 (Morton).

witness testified that she knew of no independent action, either in the form of unilateral price increases or otherwise, that could return the Free Press to profitability. Pet. App. 100a.

The only alternative offered by petitioners to save the Free Press is their reliance on the statement that "the ALJ concluded that the papers *might* raise their prices if the JOA were denied." Pet. Br. 8 (emphasis added). Petitioners would have this Court, the Attorney General, and the Free Press place the future of the Free Press on this single "might."

Obviously, as the Attorney General found, a joint price increase without a JOA was not an available alternative since such "collusion or collaborations" would be "improper" and illegal. J.A. 151. Similarly, the ALJ rejected the possibility of unilateral price increases:

[T]he Antitrust Division and Intervenor did not seriously challenge the evidence showing that future profitability could not be accomplished by any additional circulation price increases by either the Free Press or the News which was not followed by the other.

Pet. App. 89a-90a. He continued in a footnote:

While the record did not establish the price demand elasticities of the Detroit newspaper market, it is clear that any additional unilateral price increases by either paper would mean the loss of some circulation which in turn may require still additional promotional expenses, including, perhaps, discounts off the increased circulation price. A loss of circulation may in turn require a reduction in advertising prices because of the effect on milline rates.

Id. The ALJ also found that neither paper could unilaterally increase the price of advertising because such a price increase would erode the advertising in that newspaper and have an effect on circulation. Pet. App. 93a.

None of these conclusions, which were adopted by the Attorney General, is challenged by petitioners. The only remaining alternative identified by the petitioners or the ALJ is speculation that "absent a JOA Gannett *may* eventually initiate circulation price increases." Pet. App. 92a. Unfortunately, however, that speculation does not alter the fundamental economic realities of the newspaper business in Detroit. That speculation does not change the conclusion of the News management, adopted long before any JOA discussions, that there is no safe place for a second-place newspaper in Detroit (J.A. 504-09, 208, 212), or the News' conviction that it will not permit itself to become the second place newspaper (J.A. 241-42). Nor does that speculation change the testimony of the nation's leading newspaper economist, James Rosse, Provost of Stanford University, that the current policy of the News of acting to preserve its market leadership was the only strategy with any likelihood of success. J.A. 576; J.A. 320-21; Pet. App. 109a.

In the face of these *realities*, the Attorney General concluded:

Gannett has made clear that it has no intention of embarking on such a course [of price increases] either unilaterally or in conjunction with Knight-Ridder. . . . While the Administrative Law Judge questioned the testimony of Gannett to this effect . . . , it hardly reflects unsound business judgment to retain a while longer the News' current depressed pricing practices with so many indications that the Free Press and Knight-Ridder have abandoned all hope of market domination.

J.A. 148-49. A contrary view must assume that the News will ignore the economic realities of the newspaper business embodied in the Newspaper Preservation Act, and put at risk, by its own action, its own survival.

III. COMPETITION IN LITTLE ROCK

Little Rock Newspapers, Inc. ("LRNI"), publisher of the Arkansas Democrat in Little Rock, has filed here, as it did below, a brief suggesting that the Attorney General's decision should be overturned because (1) "it was based on a competitive situation created entirely by the interactive intentional conduct of the parties and not by market conditions;" (2) it "rewards potentially predatory conduct;" and (3) it creates a "blueprint for destruction of newspaper competition in Little Rock and elsewhere." LRNI Br. 17, 19, 22.⁸ LRNI's position is wrong on all three counts. First, the "interactive intentional conduct of the parties" to which it refers is head-to-head competition between two daily newspapers, precisely the sort of competition which Congress found was compelled by the unique economics of the newspaper business. Second, not only was there no finding of illegal predatory pricing in Detroit, no suggestion by the Antitrust Division that there was any such predatory pricing, and no record evidence cited by LRNI of predatory pricing in Detroit, but the Attorney General squarely found that the newspaper competition in Detroit was "waged energetically but both responsibly and properly." J.A. 151.⁹ Third, the

⁸ In addition, the LRNI brief contains an extraordinary argument that the congressional intent in passing the Newspaper Preservation Act was to "raise barriers to future JOAs by stiffening the qualification requirements" LRNI Br. 10. This argument and the related suggestions in petitioners' brief fly so squarely in the face of congressional intent to reject the "failing company" test of *Citizen Publishing* that reference to the legislative history discussed above is a sufficient response. See pages 5-7, *supra*.

⁹ There has been no allegation and no evidence presented that the Detroit newspapers' prices were below an "appropriate measure of cost". *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 117 n.12 (1986). Given the lack of evidence of the often controversial elements of predatory pricing (see generally *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 584, n.8 (1986)), this is not the case to test the proposition that natural

blueprint for survival in a newspaper war is set out not by the Attorney General's decision, but by fundamental economic realities of the newspaper business—realities LRNI understands only too well.

To understand the full irony of LRNI's position before this Court, however, it is necessary to describe some of the background, omitted from LRNI's brief, about newspaper competition in Little Rock.¹⁰ LRNI is part of a privately-held media organization which owns six daily newspapers, television stations, cable television operations, and other properties, and publishes the daily and Sunday Arkansas Democrat in Little Rock. Not long after LRNI acquired the money-losing Democrat in 1974, LRNI adopted an aggressive competitive strategy designed to increase the Democrat's circulation and advertising market shares. For example, LRNI offered all private parties *free* classified advertising. Each week LRNI distributed one full edition of the Democrat free to non-subscribers and it offered substantial special discounts to large advertisers, including a major department store, to place an unlimited amount of advertising in the Democrat at no additional cost. It would be hard to imagine any more aggressive newspaper pricing than free advertising and free distribution. Certainly there is no suggestion that either of the newspapers in Detroit went nearly as far as LRNI.

These and other competitive pricing practices by LRNI resulted in increasing the size of its losses from less than

monopolies are not subject to Sherman Act § 2 challenges, or that "the monopoly resting in economies of scale should be immune from antitrust restructuring" 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 621a, at 50 (1978). Beyond that, it is clear that the newspapers' prices were set by competitive conditions dictated by the unique economics of the newspaper industry. See *supra*, at 23-26.

¹⁰ These factual statements are drawn from the Opposition of The Detroit News, Inc. to the Motion of Little Rock Newspapers, Inc. for Leave to Appear as Amicus Curiae in the District Court, at 4-6. See n.3, *supra*.

\$1,000,000 in 1977 to \$7,600,000 in 1983 (the year before LRNI was sued by the Gazette for predatory practices). From the time LRNI purchased the Democrat in 1974 to the time of that lawsuit, LRNI rang up over \$40,000,000 in losses in Little Rock.

In defending the predatory pricing lawsuit, LRNI claimed that it was merely engaged in aggressive competition which was necessary for its survival. It maintained that there was nothing wrong with using its deep pockets to subsidize the losses in Little Rock. LRNI responded to the claim that its pricing practices would put the Gazette out of business by suggesting that the Gazette's prices were too high and that the Gazette should have responded to the Democrat's strategies with aggressive competition of its own. LRNI rested its defense on the claim that

[p]rice reductions tend to benefit consumers and the Sherman Act does not prevent a company from lowering its prices to gain enough market share to earn a profit or to compete and survive in a competitive environment.

Opposition of The Detroit News, Inc., at 5. See n.3, *supra*. After the litigation ended in a jury verdict in favor of LRNI, the independent owner of the Gazette concluded that it could not afford the substantial operating losses that the Gazette had begun to suffer as a result of LRNI's aggressive competition, and decided to sell the Gazette to a company with sufficient resources to respond to LRNI's competition.

The sale of the Gazette to Gannett in December 1986 put the Gazette in a position to respond, for the first time, to LRNI's continued aggressive competition. LRNI's Brief and the attached Affidavit of its major shareholder, Mr. Walter Hussman, make much of the Gazette's 85¢ per week circulation price offer, but do not mention that the offer was made in response to an LRNI pro-

gram that charged subscribers less than 85¢ per week. After filing its brief in this Court complaining of the Gazette's low prices, LRNI announced that Sunday subscribers could receive the Wednesday, Friday and Saturday papers "*at no additional cost.*" See "Dear Reader" letter from Walter J. Hussman, Jr., attached as an appendix to this brief (emphasis in original). In the same announcement, LRNI compared its price of \$10 per year for Wednesday, Friday, Saturday and Sunday to the \$26 price charged by the Gazette for only Friday, Saturday and Sunday. Under its new offer, LRNI's price for the Democrat is *less than 5¢ per copy including Sunday.*

LRNI's only consistent position seems to be that aggressive price competition to build circulation and advertising market shares is a rational, reasonable and necessary business practice only so long as LRNI is the party engaging in that practice. While LRNI's lawyers suggest the competitive strategies adopted by the newspapers in Detroit are "irrational" and that the Attorney General's decision provides a blueprint for future conduct, Mr. Hussman's conduct in Little Rock speaks louder than his attorneys' words. He did not need the Attorney General to tell him that the only way to return his second place newspaper to profitability was to engage in aggressive competition by reducing prices for circulation and advertising in order to build market share. His company with its deep pockets incurred losses of over \$40,000,000 to finance that competition against the then owner of the Gazette with its much smaller pockets.

LRNI successfully defended the predatory pricing lawsuit brought by the former owner of the Gazette by establishing that aggressive competitive practices, such as offering free classified advertising, distributing one edition of the newspaper a week free to non-subscribers and offering huge cuts in advertising prices to selected advertisers, were necessary for survival and the only path to future profitability for LRNI's newspaper in Little Rock.

Mr. Hussman's actions in Little Rock are eloquent testimony that the pricing practices engaged in by both newspapers in Detroit, far from being "irrational" or predatory, have been their only hope for survival. Although Mr. Hussman's attorneys make a distinction between what they call "interactive intentional conduct of the parties" and "market conditions," Mr. Hussman knows that the competitive process between two metropolitan daily newspapers is a very real "market condition," in which a voluntary decision not to compete is suicide.

Ironically, Mr. Hussman's conduct in Little Rock confirms that every newspaper publisher involved in this proceeding, whatever the size of its pockets, has reached the same conclusion as to what it takes to survive in a competitive newspaper market. The Free Press in Detroit, under Knight-Ridder's ownership with its deep pockets, concluded that it must compete aggressively to become the dominant newspaper in circulation and advertising to have a chance for survival. The News under ENA's ownership, with its then smaller pockets, concluded that its only course was to fight to preserve its leadership position in circulation and advertising in the Detroit market. The News under Gannett's ownership determined that it must continue the policies adopted under ENA's ownership to ensure that the News was the clear winner in the key competitive areas of circulation and advertising. Mr. Hussman determined in Little Rock that his only method of returning the Democrat to profitability was to compete aggressively by giving away advertising and circulation to build advertising and circulation market share.

It is not surprising that the publishers of each of these newspapers have chosen the same basic course for survival in the face of head-to-head competition in their newspaper markets. The unique economics of the newspaper business give them no other choice. Congress expressly recognized that among the factors accounting for

the failure of newspapers and justifying a JOA were "price war conditions." 116 Cong. Rec. 1787 (1970) (statement of Sen. Bennett). To suggest, as LRNI does in its brief, that competing for survival somehow disqualifies a newspaper for the exemption under the statute designed to preserve separate newspaper editorial voices, is to stand the Newspaper Preservation Act on its head.

CONCLUSION

For the foregoing reasons The Detroit News, Inc. submits that petitioners' invitation for this Court to (1) ignore the economic realities of the newspaper business and (2) emasculate the Newspaper Preservation Act, should be declined.

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Dated: August 11, 1989

APPENDIX

APPENDIX

Arkansas Democrat

Dear Reader:

This week the ARKANSAS DEMOCRAT is launching "Weekend Plus". Our Sunday subscribers will now receive our Wednesday, Friday and Saturday papers—at *no additional cost*.

And for a limited time, we are offering *new subscribers* a special introductory rate of \$10 per year for "Weekend Plus"—that's half off our regular Sunday rate.

Many people say the ARKANSAS DEMOCRAT is better than ever. We agree, and want you to enjoy some of the award-winning journalism, exclusive advertising and special sections found in all our issues.

As you may know, the GAZETTE recently increased the price of its weekend subscriptions 160%, from \$10 to \$26! So, here's the comparison:

Newspaper	Days Included	Price for New Subscribers
DEMOCRAT	Wednesday, Friday, Saturday & Sunday	\$10
GAZETTE	Friday, Saturday & Sunday	\$26

We at the ARKANSAS DEMOCRAT believe we are offering you a *better paper, at a better price*.

Mail back the enclosed envelope with your check to start delivery of "Weekend Plus". Or give us a call at 378-3456.

We hope you will enjoy the ARKANSAS DEMOCRAT.

Sincerely,

/s/ **Walter E. Hussman, Jr.**
WALTER E. HUSSMAN, JR.
Publisher

WEHJr/vag

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